

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 ALANIZ § CASE NO. 4:22-CV-1991
5 VERSUS § HOUSTON, TX
6 HARRIS COUNTY, TEXAS, et al. § WEDNESDAY,
§ MAY 10, 2023
§ 10:40 AM TO 11:39 AM

7 CONFERENCE HEARING

8 BEFORE THE HONORABLE CHARLES ESKRIDGE
9 UNITED STATES MAGISTRATE JUDGE

10 APPEARANCES:

11 FOR THE PARTIES: SEE NEXT PAGE
12 COURT REPORTER: MAYRA M. MARQUEZ
13 COURT CLERK: JENELLE GONZALEZ
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(APPEARING TELEPHONICALLY)

1 HOUSTON, TEXAS; WEDNESDAY, MAY 10, 2023; 10:40 AM

2 CLERK: All rise. The United States District Court
3 for the Southern District of Texas is now in session, the
4 Honorable Charles Eskridge presiding. God save these United
5 States and this honorable court.

6 THE COURT: Thank you, everyone. Please be seated.

7 All right. I call 22-1991, Joe Anthony Alaniz v.
8 Harris County, Texas, et al. Can I get appearance of counsel,
9 please?

10 MS. LEWIS: Yeah, good morning, Your Honor. UA Lewis
11 for the plaintiff, Joe Alaniz.

12 THE COURT: Thank you, Ms. Lewis.

13 MR. BUTT: Good morning, Your Honor. Jim Butt on
14 behalf of Harris County -- pardon me -- and Sheriff Ed
15 Gonzalez. Suzanne Bradley is not here, and I will, if the
16 Court desires, also represent Mark Cannon.

17 THE COURT: For purposes of argument, is there --
18 she's in your office, correct?

19 MR. BUTT: That is correct, Your Honor.

20 THE COURT: Okay. All right. Is she okay? I mean,
21 was there a concern?

22 MR. BUTT: Yes. She was going to a CLE in Austin, I
23 believe, so.

24 THE COURT: Okay.

25 MR. BUTT: She's there.

1 THE COURT: Okay. Well, then with that, then yeah,
2 for any questions that I have, I'm going to need to have you --
3 you (indiscernible)? I mean, you're both at the same office.
4 So, you would be --

5 MR. BUTT: Yes, there are issues of conflict in terms
6 of representation. That's why we divide them out. But for
7 purposes of --

8 THE COURT: We'll see where we go. I don't know that
9 I'll -- that it will be --

10 MR. BUTT: Sure.

11 THE COURT: -- problematic. All right. So, we're
12 back again on this one, and we have motions to dismiss again
13 pending. I am familiar with the background of the case. So,
14 let's -- let's figure out where we go from here.

15 So, we have claims against Harris County, Sheriff
16 Gonzalez, and Deputy Cannon; is that correct? Those are our
17 three defendants.

18 MS. LEWIS: That is correct, Your Honor.

19 THE COURT: All right. So, let's start with Harris
20 County. And I am familiar with the factual background here.
21 On the Monell claims, there are a lot of different angles at
22 trying to state what might be a theory, but a lot of it is
23 specification of the theory with -- without, I'm not sure,
24 enough underlying it to allow it to proceed.

25 So, let's start with inadequate policies on excessive

1 force. What are the policies?

2 MS. LEWIS: Well, Your Honor, we believe that --
3 well, I believe that the lack of policy is the issue, that
4 there's not -- that there's inadequate training on the
5 constitutional limits of the use of excessive force when a
6 person is not resisting, when they have not committed a crime,
7 and that was the moving force behind my client's --

8 THE COURT: So, that would be a failure to train
9 claim, because basically a failure to train --

10 MS. LEWIS: Yes.

11 THE COURT: All right. If -- I'm going to -- and I
12 will obviously get to that. But I just take it right now, you
13 don't have a particular policy in mind. You're just simply
14 saying there's no policies and that's the problem?

15 MS. LEWIS: Yes, Your Honor. There -- the -- on the
16 training aspect, and also as far as the training on arresting
17 individuals that are for -- without -- without -- excuse me,
18 with lack of probable cause that are officer initiated arrests,
19 not where somebody's -- you know, they're investigating or
20 they're calling, where there's no other complaining witness but
21 the officer, there is -- there is a substantial amount of cases
22 that are dismissed in those instances.

23 It's almost like a type of arrest scenario where
24 they're upset with the individual that they encounter out in
25 the street and the officer decides that I will arrest you,

1 punish you by arrest, knowing there's no probable cause, but at
2 least I'll inconvenience you for the moment, although I know it
3 will be dismissed once there is a probable cause evaluation.

4 And we believe that there is a -- a widespread
5 practice of this, and it's evident by some of the -- some of
6 the dismissals in the Harris County Court, which there were --
7 there were -- I mean, there was hundreds. I couldn't -- I
8 couldn't list them all, but there were hundreds and hundreds of
9 instances where individuals had been dismissed from the -- from
10 their criminal complaints as a result of there not being any
11 probable cause.

12 And we look at what was the basis of the probable
13 cause. It's all based on essentially a false statement by the
14 police officers to the district attorney or --

15 THE COURT: But even if we're -- if we're getting to
16 a pattern or practice, my understanding of your pleading is
17 that of 1800 arrests made per year on average, about 5 percent
18 are unlawful false arrests without probable cause, right?

19 MS. LEWIS: Right. Yes.

20 THE COURT: So --

21 MS. LEWIS: And that could be reduced, Your Honor.
22 That could actually be reduced because --

23 THE COURT: What could be --

24 MS. LEWIS: -- when we look at the 1800 arrests --
25 excuse me, I'm sorry. When we look at the 1800 arrests, those

1 aren't 1800 officer-initiated arrests. And when we -- when we
2 narrow it down to the officer-initiated arrests where they're --
3 -- the officer is the complainant, that number gets much more
4 narrow. And again, that's something that I definitely can put
5 forth evidence at a summary judgment stage.

6 But at this stage, I'm pleading those facts that
7 these officer-initiated arrests, whether it's for -- like
8 there's a bucket of these arrests which are officer initiated
9 like the resisting, the assault of a police officer, the -- in
10 -- in this case, I believe -- well, he didn't even -- he wasn't
11 even charged with a crime in this case. He was just arrested.
12 There's not even a crime alleged against Mr. Alaniz. But in
13 any event, the detainment and the arrests are all not dealing
14 with any third party but the arresting officer.

15 THE COURT: Mm-hmm.

16 MS. LEWIS: And interference with public duties is
17 also a prime example of these officer-initiated arrests, that
18 ultimately when the body camera footage comes out, whenever
19 it's released in criminal court or the incident report, just
20 based on the facts that are alleged in the incident report,
21 show that there was no probable cause from the onset to arrest
22 these --

23 THE COURT: You're talking about this case? Talking
24 about this case or just generally?

25 MS. LEWIS: Including this -- including this case and

1 in general. And we don't have -- obviously, we don't have --

2 THE COURT: So, your -- I mean, your assertion is if
3 I was to look at all the body cam footage that's out there on
4 every arrest, I would agree that there's a lot of arrests being
5 made without probable cause; is that what you're saying?

6 MS. LEWIS: I wouldn't say every arrest. I would say
7 there's --

8 THE COURT: No, and I didn't say that either.

9 MS. LEWIS: Okay.

10 THE COURT: I would find it a lot, because I will
11 tell you, I've looked at a lot of body cam footage.

12 MS. LEWIS: Mm-hmm.

13 THE COURT: I rarely see anything that I see as like
14 just wholly without probable cause. There might be instances
15 of, okay, was that sufficient provocation or -- it is not like,
16 you know, when you go look at body cam footage, people that are
17 doing blameless things like just peaceably going along are
18 being taken down by officers. Is that what you're trying to
19 say happens out in Harris County?

20 MS. LEWIS: What I'm saying --

21 THE COURT: Because I've looked at a lot of body cam
22 footage, and that's not what I've seen.

23 MS. LEWIS: Your Honor, well, what I would say is I
24 would narrow that, your view of the body camera footage, to
25 Harris County sheriff deputies who -- who arrest individuals

1 for officer-initiated arrests, not just general arrests for,
2 you know, traffic tickets or, you know, traffic violations or
3 anything like that. I mean, specific --

4 THE COURT: But a traffic ticket is an officer-
5 initiated contact.

6 MS. LEWIS: It is, and that's why -- that's what --

7 THE COURT: I mean, that's the thing.

8 MS. LEWIS: That's why I'm carving that out.

9 THE COURT: When you're saying officer initiated, are
10 you talking about arrests that officers believe they've
11 perceived something going on and they act as opposed to, hey,
12 we've got a warrant for arrest coming to you, we give this to
13 the officer, now go find and arrest that person? Is that the
14 distinction that you're making?

15 MS. LEWIS: No, it's not.

16 THE COURT: Okay. What is the distinction you're
17 making?

18 MS. LEWIS: My distinction, Your Honor, is that these
19 are individuals that come into police contact where there is
20 some sort of discourse, disagreement, and there is no -- excuse
21 me, there's no crime being committed whatsoever. It's not an
22 investigation. It's just a matter of we're in disagreement,
23 and as my -- my co-counsel in other cases pointed out, it's a
24 failure to bow down to police officers when there is a
25 disagreement.

1 The trump card is the arrest, and I might take you to
2 jail for the night and you may be -- you may be released the
3 next day, but at least I've disrupted your life for this day.
4 And I -- and I'm saying that the -- and I -- and I know this --
5 and I know you're speaking from your personal experience in
6 viewing the body camera footage. I don't know if it's from
7 this vantage point of officer initiated, you know, interference
8 with public duties, resisting arrest type of incidents, but I
9 know that I personally have been a victim of that myself.

10 THE COURT: In the underlying situation here, and
11 again, it's one thing if you're talking about officers going up
12 to people that are walking down the street and nothing else is
13 going on. On the facts that are alleged here is everything
14 that was happening in this area, like if I look at the body cam
15 and what's going on here, is everything that was going on in
16 the gathering that had occurred there, am I going to see wholly
17 peaceable conduct across all persons in the community in that
18 area at the time? Is that what I'm going to see if I look at
19 the body cam footage here?

20 MS. LEWIS: Your Honor, I will -- if I could -- if I
21 could just couch this in this way? I don't know what the
22 events would be leading up to what Officer Cannon saw in his --
23 his body cam footage, but as far as my client is concerned --
24 and you know, it's -- it should be evidently -- it should be
25 evident that --

1 THE COURT: Well, but I get ultimately to qualified
2 immunity, and it's not just your client. It's literally what
3 was going on with the officer.

4 MS. LEWIS: Right.

5 THE COURT: That's why there's qualified immunity.
6 What could that officer reasonably perceive was going on and
7 what needed to happen in that situation? I haven't seen the
8 body cam footage, but if I do see the body cam footage, am I
9 going to see around your client everything is peaceable and
10 there's nothing of any concern that anyone is -- in the
11 community is doing in that congregation at the time?

12 MS. LEWIS: Your Honor, yes. To answer your
13 question, yes, as far as my client is concerned, and I think
14 that's what we've pled. We didn't -- so, I know the defense
15 has tried to interject facts --

16 THE COURT: I know that you've pleaded that your
17 client was peaceable and he was not participating in the
18 protests.

19 MS. LEWIS: Right.

20 THE COURT: I'm asking about the protests.

21 MS. LEWIS: There was no protests and -- there was no
22 protest in the area where my client was stationed.

23 THE COURT: What -- but he was filming something.
24 So, what was he filming?

25 MS. LEWIS: Right. So, the scenario is, is that he

1 was --

2 THE COURT: And like, when you say the area, are you
3 saying, well, within five feet around him? Because what if I
4 said, well, within 500 feet of him?

5 MS. LEWIS: I --

6 THE COURT: Then am I going to see no conduct that's
7 of any concern?

8 MS. LEWIS: I don't -- I don't know. I'm not --

9 THE COURT: Have you seen the body cam footage?

10 MS. LEWIS: I'm not -- I don't think I have, but I've
11 seen --

12 THE COURT: How could you not have seen the body cam
13 footage and be pleading a cause of action in this court?

14 MS. LEWIS: Well, Your Honor, as -- if you were on
15 the -- if you ever worked on the plaintiff's side of a civil
16 rights case, we don't get any information. That information is
17 not disclosed to us through public records or through any other
18 means, but I did get a Facebook --

19 THE COURT: But you're -- okay. Has the body cam
20 footage been turned over? I thought it was public. I mean, I
21 haven't seen it, because it's like it's not attached to the
22 complaint. I thought -- I thought it was available.

23 MR. BUTT: I can't answer definitively on that
24 question, Your Honor, but I can certainly provide it.

25 THE COURT: Okay. Let -- so, then let me -- we've

1 been talking about footage. Let me rephrase that. I mean,
2 your client was there filming things.

3 MS. LEWIS: Yes.

4 THE COURT: You viewed that footage?

5 MS. LEWIS: I was able to view --

6 THE COURT: Okay.

7 MS. LEWIS: -- the Facebook footage. Yes.

8 THE COURT: All right. That's -- that's right,
9 because this was streaming live on Facebook.

10 MS. LEWIS: Yes.

11 THE COURT: Typically when someone stops to film
12 something and stream it live on Facebook, it's because
13 something concerning or interesting is going on.

14 MS. LEWIS: Right.

15 THE COURT: Okay. What was he streaming?

16 MS. LEWIS: He was streaming a crowd moving, which he
17 was not a part of, and -- he was not a part of the crowd. He
18 wasn't near the crowd, filming from a distance, and as the
19 pleading states, he was -- he was -- he didn't even know what
20 was going on. He has a -- he has a condition where he rides
21 his bike as therapy, and then his normal route was disrupted
22 that day by seeing this, you know, this crowd, and I -- and I'm
23 not going to -- I don't know if I pled it as a protest, but --
24 and I don't know the size of the crowd, but it wasn't that
25 large based -- I guess it was just a disruption from his normal

1 routine to see police activity around and so forth.

2 But at all times, my client was compliant as pled in
3 the complaint. We -- we have objected to the facts that the
4 defendants have tried to interject at every turn when it -- as,
5 you know, in response saying that this was a protest, he was
6 resisting, and all these other facts that they're not allowed
7 to -- well, they -- they can try to interject but are not to be
8 considered because they are outside of the complaint.

9 And my client just was an innocent bystander here.
10 He was not -- he was not a threat to warrant the use of force
11 and he did not commit any crime. He -- and so he -- but he --
12 although he was detained and brought to the jail -- and mind
13 you, there were never any charges brought against him. There
14 wasn't even an incident report to -- to hold him.

15 THE COURT: Okay. All right. Mr. Butt?

16 MR. BUTT: Well --

17 THE COURT: And we've actually sort of -- I was going
18 to go claim by claim, but we kind of got inadequate policies on
19 excessive force, pattern or practice of unlawful arrests,
20 pattern or practice of excessive force, failure to train or
21 supervise, ratification. So, proceed on any or all of those as
22 you'd like.

23 MR. BUTT: Sure. Certainly, Your Honor. In Document
24 39, the plaintiff's second amended complaint, much attention
25 was given to patterns of false arrest, 11 pages of -- on

1 Appendix A.

2 And in my motion on behalf of Harris County, I
3 attempted to address each one of those incidents listed in
4 Appendix A to show that indeed probable cause existed for
5 those. So, we submit that the plaintiff has not alleged a
6 Monell claim based upon false arrest.

7 And insofar as Monell requires policy, practice, or
8 custom, it appears that plaintiff is relying on this particular
9 incident for excessive force and that is in and of itself
10 insufficient --

11 THE COURT: So, on -- on the Appendix A which is --
12 it's Pages -- Pages 22 to 33 of Docket 39 --

13 MR. BUTT: Yes, Your Honor.

14 THE COURT: -- and there's 15 or so per page, which
15 are titled Cases of Arrest by Harris County Sheriff Dismissed
16 For Lack of Probable Cause, and you're articulating that --

17 MR. BUTT: In docket --

18 THE COURT: Well, you can go through those and show
19 that there was probable cause?

20 MR. BUTT: Yes. In Document 42-1, I do go through
21 every one of them.

22 THE COURT: Right. And that's the thing. Can I do
23 that on motion to dismiss?

24 MR. BUTT: It's -- if it's referenced in the motion,
25 it opens the door --

1 THE COURT: To then --

2 MR. BUTT: -- for the other side to show it.

3 THE COURT: But -- yes.

4 MR. BUTT: And since it's referenced in the motion,
5 we submit that the Court's consideration is appropriate.

6 THE COURT: But these are all, you know -- and you
7 have attached at 42-1 the very first -- I assume it's, yeah,
8 they'll probably track an order to Exhibit A to Docket 39, but
9 it's a form that's been completed as to the April Nicole
10 Leonard matter, and it's titled Probable Cause For Further
11 Detention, Statutory Warnings by Magistrate, and that's a
12 finding that was made.

13 And then the same form as to Jose Melgar followed by
14 his plea of guilty, I guess, and then the next one for Russell
15 Juan Morailles, but that jumps over Dominique Lewis, et cetera,
16 et cetera.

17 And I'm -- I don't know what factually plaintiff
18 would say about each of those in retort or if there's anything
19 that can be said. It feels like summary judgment to me. It
20 feels like a very -- it feels like a very good summary judgment
21 to me. I -- I just -- jumping all the way to that on motion to
22 dismiss is a little tough.

23 MR. BUTT: Yes, Your Honor.

24 THE COURT: Any -- I mean, I see where you're going
25 with it. I'm just sort of like how fast do we get there, if

1 that's going to be -- if there's not an explanation for what I
2 ultimately might be taking judicial notice of as to proceedings
3 in Harris County. What do you think about that? Well, let me
4 -- let me have you pause and think about that.

5 Ms. Lewis, when you have something facing you like
6 the attachments that are at docket 42-1, you become constrained
7 by Rule 11 as to what you are able to continue arguing about
8 what you've previously put in front of me as to probable cause.
9 You gave me a long list of no probable cause arrests followed
10 by -- Mr. Butt, did you attempt to refute every single one of
11 them or just the ones that you could?

12 MR. BUTT: Every one, Your Honor, every one.

13 THE COURT: Right. And so, there may be challenges
14 as to some, but with what you see in Docket 42-1, does that
15 constrain you in any way as to what you pleaded as to your
16 Exhibit A?

17 MS. LEWIS: It doesn't, Your Honor.

18 THE COURT: Why not?

19 MS. LEWIS: The reason why is because those cases
20 that they cited was to the wrong document. It was -- that
21 exhibit -- that was for the -- that was from the original
22 complaint that the defendant -- that the -- excuse me, that --
23 obviously you know the history of the case. That was dismissed
24 and refiled. That is the response to that.

25 And what I noticed was I actually attached -- I have

1 different cases in different courts where that is applicable,
2 that table was applicable to, and that was during a period of
3 time, I believe it's a lot of 2016 arrests, and this was after
4 --

5 THE COURT: All right.

6 MS. LEWIS: -- Sheriff Gonzalez came into office,
7 which was in 2017. So, that -- they actually responded to the
8 -- the original, which I was able to correct, but they -- the
9 original Appendix A, which is not --

10 THE COURT: I just -- okay. There might be some
11 explanation. I'm simply pairing the fact that you have a chart
12 saying cases of arrest by Harris County sheriff dismissed for
13 lack of probable cause, which has been responded to with a raft
14 of documents showing -- titled Probable Cause for Further
15 Detention and Statutory Warnings by Magistrate.

16 And so, you're saying these -- these things just are
17 ships passing in the night and your statement as to -- it's one
18 thing to say these are all lack of probable cause, and you
19 could believe that at the time. There's now a raft of court
20 documents that appear to say there was probable cause, and so
21 you can continue to maintain there was no probable cause, but
22 if that opens your eyes as to I may not have stated correctly
23 as to this big list of cases, you need to be careful about what
24 you continue to argue after that.

25 MS. LEWIS: Yes. And Your Honor, as I was stating,

1 the actual response given by the defendant was not in response
2 to the live complaint.

3 THE COURT: All right. All right. So, with that --
4 okay. All right. I'm going to have to address that on summary
5 judgment. (Indiscernible) what was the United Airlines case?
6 United Airlines v. Thomas or Thomas v. United Airlines? No, we
7 don't need the cite. I have a recent decision. It's not --
8 it's not in a municipal liability context. It is as to
9 underlying complaints that a plaintiff's attorney originally
10 thought were true, but which proved not to be true, but which
11 counsel continued to maintain as true.

12 And I have follow-on proceedings going on under Rule
13 11 there, and I'm not saying you have to withdraw this. I'm
14 just saying it's fine on the information and belief that you
15 have at a time to plead something about what the state of the
16 facts is, but when you are -- that's the thing. As lawyers,
17 we're educating ourselves about the facts. If the facts about
18 what you've pleaded are educating you that -- again, we're
19 talking about court documents here. If it changes what you've
20 previously pleaded, I urge you to not continue to -- to plead
21 it and argue it the same way.

22 MS. LEWIS: Yes, Your Honor.

23 THE COURT: And so look at that case because there
24 are follow-on proceedings going there as to what consequences
25 may fall under Rule 11 and whether -- it's a very different

1 case there, whether the client in that case may potentially be
2 referred to the U.S. attorney for making false statements.

3 That was about things pertinent to her personal
4 knowledge. That's very different than your client here who he
5 just got arrested on the street. He didn't know anything about
6 all these other cases. So, I'm not saying he's saying anything
7 wrong about all that. I bring it to your attention just that I
8 take it very seriously.

9 MS. LEWIS: I appreciate that, Your Honor.

10 THE COURT: Okay? And I know Mr. -- I have Mr. --
11 I've had you in front of me before as well. I think --

12 MS. LEWIS: It's been a long time, but yes.

13 THE COURT: Yeah, but not just on this case, but Mr.
14 Butt does, you know -- he gathers and he -- here's the
15 information we've got, right? And it's -- we're trying to
16 adjust, you know, what's really going on in the background here
17 as to what claims might be able to proceed.

18 MS. LEWIS: Yes.

19 THE COURT: So, Mr. Butt, I don't know what to say
20 beyond that other than that I think I'm going to take it up
21 again on summary judgment.

22 MR. BUTT: Certainly, Your Honor.

23 THE COURT: Okay. How much discovery -- what needs
24 to be done to get to -- a lot of this is -- what discovery will
25 need to be done from your view before we can get to summary

1 judgment?

2 MR. BUTT: One --

3 THE COURT: Ms. Lewis may well have a very different
4 view about what discovery is needed.

5 MR. BUTT: Sure. I would want to take the deposition
6 of Mr. Alaniz.

7 THE COURT: Of course.

8 MR. BUTT: Find out what his medical claims are and
9 get the documentation of his alleged injuries, and further
10 flesh out from the plaintiff what the Monell I guess evidence
11 or appendix really is so I know I'm tracking on where the claim
12 is.

13 THE COURT: Well, that goes to the ADA claim.

14 MR. BUTT: Well, the ADA I think under
15 (indiscernible) --

16 THE COURT: At least the part that you were saying at
17 the end. I was more like on the Monell --

18 MR. BUTT: Oh, okay. On the Monell, I would say if
19 she is going to rely on a chart of an appendix then to give me
20 her best chart or appendix to show a policy practice.

21 THE COURT: Yeah. And Ms. Lewis, what do you think
22 you're going to need?

23 MS. LEWIS: Your Honor, I would like depositions as
24 well of -- of the defendants as well as standard discovery, my
25 production, and I -- the incident reports primarily of these

1 arrests that -- that I discovered, and I'll give them a list,
2 I'll give him a list, or --

3 THE COURT: I will say one concern I have is on a lot
4 of the things that -- that you claim are inadequate here,
5 connecting them as being the moving force behind the punitive
6 constitutional violation, I guess I would just say pay
7 attention to that, because I'm not sure that I -- I see it.

8 MS. LEWIS: Yes, Your Honor.

9 THE COURT: And you know, honestly -- and Mr. Butt,
10 as I said before, you'll be turning over -- if officer --
11 Deputy Cannon had body cam footage, that'll be turned over.
12 But then on summary judgment, I'll be reviewing that. And have
13 you turned over your client's video to Mr. Butt?

14 MS. LEWIS: I'm not sure if I turned over the actual
15 video, but maybe the link. I --

16 THE COURT: But it's there on Facebook?

17 MS. LEWIS: Yes, I -- I'm not certain but I can. I
18 will as well.

19 THE COURT: I look at it just less technically than
20 that. The video that's available of the incident from your
21 client's standpoint and whether that's only preserved on the
22 Facebook link or whether there's -- he's got more footage,
23 whatever that footage is needs to be turned over as well.

24 MS. LEWIS: I can reduce it to a file and -- and just
25 Dropbox it over to them. I don't think that'll be a problem.

1 THE COURT: Because I'll take -- if you've looked at
2 my other municipal liability and qualified immunity cases, I
3 and my law clerks, we -- we sit and watch all the video.

4 MS. LEWIS: Nice.

5 THE COURT: Yeah. So, all right. All right. Let's
6 go on to the ADA claim. So, what proof, what allegation, do we
7 have as to proof that Harris County -- and I guess that would
8 be as to knowledge that it derived at the time through Deputy
9 Cannon had of your client's disability and its limitations?
10 And can you please describe for the record his disability?

11 MS. LEWIS: Yes, Your Honor. The disability that my
12 -- my client has is he has a -- a brain tumor.

13 THE COURT: Okay.

14 MS. LEWIS: A -- it's a --

15 THE COURT: Makes him prone to seizures?

16 MS. LEWIS: Yes, it does. It's non-cancerous. And
17 so, it cause --

18 THE COURT: But it's not something visible?

19 MS. LEWIS: It's not visible. It isn't, but it does
20 cause a -- a delay in his responses.

21 THE COURT: Okay.

22 MS. LEWIS: It causes, you know, his cognitive
23 ability to be just delayed and slowed down. And so, it's our
24 position that Mr. Cannon was not -- or Officer Cannon was not
25 trained properly to adequately identify a person with a need

1 for an accommodation like Mr. Alaniz, to allow him an
2 opportunity --

3 THE COURT: Okay. That would go -- but -- okay, so I
4 hear that as to the Monell claim.

5 MS. LEWIS: Right. Yeah, I guess, it does --

6 THE COURT: But you have a claim. So, there's that.

7 MS. LEWIS: Yeah.

8 THE COURT: But you have the -- you have a direct
9 claim under the ADA, right?

10 MS. LEWIS: Yes. And that's the failure to
11 accommodate.

12 THE COURT: And what is there as to -- like, as
13 opposed to, hey, you don't have a good enough policy to
14 identify potential ADA problems? That's almost conceding that
15 the ADA itself wasn't violated here. It's that you needed to
16 have policies to allow officers to better identify with someone
17 who might have a hidden limitation?

18 MS. LEWIS: Yes.

19 THE COURT: Isn't that --

20 MS. LEWIS: I can see -- yeah, I can see where you
21 would -- where it would be perceived that it was kind of a
22 concession, but I will say this. No matter whether there's a
23 failure to train -- and you're right, I was conflating the two.

24 THE COURT: Yeah, yeah.

25 MS. LEWIS: But no -- but no matter, where there's a

1 failure to train, they -- since the county was -- was --
2 interacted with Mr. Alaniz, they did have a -- a requirement, a
3 duty, to accommodate him for his disability. And the reason
4 why they didn't is not really relevant. But the fact of the
5 matter is that they didn't --

6 THE COURT: Well, but it's --

7 MS. LEWIS: He as not accommodated.

8 THE COURT: -- it's relevant if the public entity or
9 the person dealing with the one with the disability doesn't
10 know that there's a disability. That's I think where it
11 becomes relevant.

12 MS. LEWIS: I understand.

13 THE COURT: Isn't that correct?

14 MS. LEWIS: Yeah, I understand that and -- and I
15 guess that -- it -- I don't think that that's an excuse. It's
16 under the ADA, if a person is trying to explain their
17 disability and they're not able to.

18 THE COURT: Right. And that was what happened here.
19 And so, he never -- and he didn't articulate here's what my
20 disability is. You're saying he didn't have a chance to.

21 MS. LEWIS: It was cut short. Yes.

22 THE COURT: Okay. Mr. Butt?

23 MR. BUTT: Well, Your Honor, it appears that this
24 would be something like an occult condition that would not be
25 obvious, and we rely upon Hainze v. Richards which addresses

1 under 5th Circuit Authority the ADA issue on on-the-street
2 responses to reported disturbances and states that it really is
3 not covered by ADA in the 5th Circuit.

4 THE COURT: Mm-hmm.

5 MR. BUTT: So, I think the plaintiff is stretching
6 and shoe horning this issue into his complaint, and it doesn't
7 fit.

8 THE COURT: Yeah, and that if it fits anywhere, it
9 fits in a category of policies that you're complaining about
10 under Monell.

11 MS. LEWIS: Well, Your Honor, I would like to just
12 make --

13 THE COURT: Sure.

14 MS. LEWIS: -- make a distinction with the 5th
15 Circuit case. So, it's true, the 5th Circuit does say that an
16 officer does have -- on the street does not have to necessarily
17 comply with ADA if they're securing the scene, and I think
18 that's the difference here. We never pled that this officer
19 was securing any scene. And you -- before you can assess
20 whether a person has an accommodation need, that is where the --
21 -- the officer or the entity is -- is absolved from -- from
22 accommodating an individual that has a disability.

23 But that is the -- that is the only reason why an
24 accommodation is not required on the street, is because the
25 officer has to assess safety and --

1 THE COURT: But leading into -- Paragraph 16 is
2 Deputy Cannon advises your client to leave the sidewalk. And
3 after that, Mr. Alaniz tries to explain, et cetera, but leading
4 up to that, Paragraph 12 -- so, before that, he -- your
5 client's riding his bike. Paragraph 12, he reaches the area
6 where he's going to begin filming. He sees -- came upon a
7 group of unknown individuals who were gathering and a group of
8 officers. He stopped to assess the situation and was asked by
9 a different officer to move along.

10 He tried to keep his distance from everybody and
11 remain safe as he filmed the historical event unfolding in
12 Houston live on Facebook, and unbeknownst to him, the
13 protesters and officers were gathered in the area as a result
14 of the news and cell phone footage released of the killing of
15 Houston native George Floyd that had just been released. And
16 he's saying he was unaware of the protests and had no
17 intentions of participating, et cetera.

18 I mean, I hear in this, his pleading, that the
19 officers are there securing the scene, making sure that it
20 remains safe and doesn't become a difficult situation that had
21 been seen arising in lots of different places with the release
22 of that footage, right?

23 MS. LEWIS: Well --

24 THE COURT: And --

25 MS. LEWIS: -- I think the body cam would probably be

1 the best source to -- to realize the distance. I -- I tried to
2 plead the fact that he was away from everyone and Officer
3 Cannon actually went over to him, but obviously you're --
4 that's not what you're taking from my facts that I've pled
5 here, and I think the body cam would give us the best
6 assessment of the actual distance my client was away -- away
7 from -- from the officer, and if that was a part of securing
8 the scene.

9 THE COURT: What is your client going to -- what is
10 your client going to testify that he was unaware of at the
11 time?

12 MS. LEWIS: He had no idea about George Floyd passing
13 away or any of that -- those events.

14 THE COURT: Like literally --

15 MS. LEWIS: I didn't even know. Yeah, I -- yes, I
16 mean, I do this work and I didn't even know when it -- yeah,
17 when it happened.

18 THE COURT: Okay. All right. This is all on May
19 29th.

20 MS. LEWIS: Well, maybe I knew by then, but yeah, I -
21 -

22 THE COURT: What's that?

23 MS. LEWIS: I said maybe I did know by May 29th.

24 THE COURT: I was just going to --

25 MS. LEWIS: I think he died three days -- I think he

1 died like maybe on the 25th or 26th, something like that.

2 THE COURT: That's what I thought. May 25th. So,
3 this is four days later.

4 MS. LEWIS: Yes.

5 THE COURT: Although I'm not clearly remembering how
6 quickly things were being publicized, et cetera. All right.

7 As to the ADA claim, I've already articulated that I
8 hear the policy failure that you're articulating that -- that I
9 would think would fold in as an aspect of your Monell claim,
10 but as to an -- a standalone ADA claim, given the Hainze case,
11 Hainze v. Richards, 207 F.3d 795, 5th Circuit in 2000, what's
12 articulated there vis-à-vis what you've pleaded, which was it
13 is articulating a scene which officers are there in response to
14 secure or make -- make sure that an area stays safe, and that
15 Mr. Alaniz was not able to and did not articulate a disability
16 to them at the time, the ADA claim can't go forward.

17 But Ms. Lewis, the fact that he was unable to
18 articulate his condition remains something that -- that might
19 be a policy concern under the Monell claim that will be
20 proceeding from here, okay? Does that make sense?

21 MS. LEWIS: It does, Your Honor. Thank you.

22 THE COURT: All right. All right. And so, that
23 claim will be dismissed with prejudice. You've re-pleaded, and
24 my conclusion is the facts as pleaded aren't adding up to a
25 claim.

1 There were claims under Section 1981, 82, and 85, but
2 which aren't really defended in response on the motion to
3 dismiss. Are those -- there's a motion to dismiss as to those.
4 Are those going -- I don't think --

5 MS. LEWIS: They're not. Yes, we're --

6 THE COURT: Okay. So, those are withdrawn. All
7 right; is that correct?

8 MS. LEWIS: Yes, it is correct, Your Honor.

9 THE COURT: To the extent that those sections were
10 mentioned, any claim as to them is withdrawn; is that correct?

11 MS. LEWIS: That is correct, Your Honor.

12 THE COURT: All right. So, Sections 1981, 82, and 85
13 are withdrawn.

14 Mr. Butt, as to the supervisor liability and the
15 failure to train or supervise, given that with what's going
16 forward on the Monell claim, is there a reason why I would
17 proceed differently on Sheriff Gonzalez as opposed to taking
18 that up again on a later motion? There are -- I understand
19 that they're conceptually distinct, but tell me why the sheriff
20 -- why I would be inclined to let the sheriff out when there's
21 going to be policy inquiry going on prior to resolution as to
22 Harris County itself?

23 MR. BUTT: Well, in his individual capacity, we
24 submit that there's no nexus where he participated in any
25 deprivation of any civil rights in this case. So, because he

1 as an individual, a human, is being sued in that capacity, we
2 submit the nexus of personal participation is missing. So, he
3 wasn't there, and he certainly is far removed in terms of the
4 structure of command from a deputy in the field so that a
5 training claim or a supervision claim would not reach him, Your
6 Honor.

7 THE COURT: But the -- at least as to failure -- I
8 hear your argument as to supervisory liability, but as to
9 failure to train or supervise, I mean, a supervisor can be
10 liable for that, correct?

11 MR. BUTT: Yes, Your Honor. I think the case law
12 says that liability is at its most tenuous on a training claim
13 --

14 THE COURT: Right. It is. Mm-hmm.

15 MR. BUTT: And this would be tenuous, quite tenuous.
16 Because the claim is somewhat ill defined, and in general I
17 submit that it doesn't reach him because it has to be specific
18 to show that he has personal involvement, and Harris County
19 would suffice in terms of a defendant in -- in terms of a
20 Monell claim, but the suing of an individual for Monell, unless
21 there is a --

22 THE COURT: Let me ask Ms. Lewis about that. Ms.
23 Lewis, I mean, as to that point, do you need -- there's a lot
24 of concern about policies that Gonzalez may have been involved
25 in or aware of, but I'm letting you go forward. As to that,

1 there'll be discovery on that vis-à-vis Harris County. Harris
2 County obviously can stand behind any potential judgment better
3 than the sheriff could. Is there a need to go forward against
4 the sheriff given where we are at this point?

5 MS. LEWIS: Your Honor, I balance that a lot.

6 THE COURT: Say again?

7 MS. LEWIS: I balance that a lot.

8 THE COURT: Okay.

9 MS. LEWIS: I do, and just for practical purposes,
10 not for -- not -- because I do -- I do believe that we've pled
11 enough to show his personal involvement. Case law is pretty
12 clear that when, you know, just the failure to train and the
13 lack of policies, or policies that are in place from the policy
14 maker, which obviously we had to plea, is sufficient to show
15 that there is a -- there is personal involvement, and when I
16 say I balance that a lot, I -- I've been -- I've been to the
17 5th Circuit enough, and if I can avoid it, that would be great
18 and we can get the case moving along.

19 So, I do balance that, and so I've taken the position
20 of continuing with a lot of my cases by pleading in the
21 official capacity as well as the individual capacity, and I
22 have been known to dismiss the individual capacity claims for
23 the reasons that you set forth, that Harris County or whatever
24 entity that I ultimately end up moving forward with -- and
25 that's likely what I'll -- I will do here.

1 But if we're going to go -- if they're appealing the
2 -- and I'm not so quick to do that, I should say. I'm going to
3 pull that back. If we're going to be heading to the 5th
4 Circuit based on a Monell claim -- excuse me, a qualified
5 immunity with Cannon, then, you know, we're going to be there
6 anyway.

7 So, if they -- if they end up appealing the denial of
8 qualified immunity as to Cannon, then we'll ultimately be in
9 the 5th Circuit anyway, and I might as well fight it all, but
10 if they don't intend on appealing, and if we're still going to
11 be stalled in this -- in the trial in the district court with -
12 - with -- I think you understand what I'm saying, but if we're
13 going to be stalled here in the -- in the -- the district court
14 because we're waiting for Cannon's appeal, then it's useless
15 for me to go ahead and dismiss the sheriff now. But if -- if
16 that's not going to happen, if I don't have to deal with an
17 interlocutory appeal, I will do -- I will make whatever efforts
18 I can to not deal with that and move this case forward, which -
19 - which would include dismissing the sheriff in his individual
20 capacity. So, essentially the ball is in their court.

21 THE COURT: But that's something that you're saying
22 that you would consider later but not now?

23 MS. LEWIS: Your Honor, yes. It would be what I
24 would consider based --

25 THE COURT: If you're -- you've sued the sheriff in

1 his official capacity and in his individual capacity?

2 MS. LEWIS: I did.

3 THE COURT: All right, the official -- and I think
4 we're talking about in his individual capacity here.

5 MS. LEWIS: Absolutely. Yes. And so, for figure
6 purposes, he's still in the case as an --

7 THE COURT: In his official capacity?

8 MS. LEWIS: -- in his official capacity.

9 THE COURT: But, and so then as to his individual
10 capacity?

11 MS. LEWIS: And as to his individual capacity,
12 there's -- we've pled facts to support his personal
13 involvement, and as I stated, if there is an interlocutory
14 appeal at all --

15 THE COURT: Okay.

16 MS. LEWIS: -- then I -- if it's just for the
17 sheriff, I will just -- I will more likely than not dismiss the
18 sheriff's individual capacity claim.

19 THE COURT: Let me ask Mr. Butt. Is it -- is it
20 improper -- do you have a problem -- given with what's going
21 forward against Harris County, I -- and I could be wrong, I
22 would think that you don't have a problem with an official
23 capacity claim against Sheriff Gonzalez, because it's the same
24 thing.

25 MR. BUTT: Absolutely. It's fine. But I --

1 THE COURT: But then the individual capacity -- now,
2 articulate for me why you think the individual capacity ought
3 to be dismissed.

4 MR. BUTT: Well, Monell liability is not vicarious
5 liability.

6 THE COURT: Oh, no, I get that. So, I'm saying, so
7 tell me why what Ms. Lewis has pleaded is not enough to go
8 beyond Monell liability but to tag him for individual
9 liability.

10 MR. BUTT: She has not attached any of his activities
11 or anything that he did in terms of what happened on May the
12 29th, and the individual's actions are at -- at issue here.
13 She has not shown his personal involvement at the scene of this
14 protest or any involvement he had so that she would have to
15 show he affirmatively participated in acts which caused a
16 constitutional deprivation or implemented an unconstitutional
17 policy that causally resulted in the plaintiff's injuries, and
18 she hasn't shown that.

19 Now, she might be fishing for it, but it's not there
20 in her pleadings. So, I submit she appears to be gaming,
21 whether or not there might be appeals, that there be no appeal
22 for the county. It cannot appeal interlocutorily because it's
23 there.

24 THE COURT: Mm-hmm.

25 MR. BUTT: But for an individual to be sued, there

1 must be something that the individual did, and she has failed
2 to establish that in her pleadings. So, I submit that she's
3 failed and has no grounds to sue the sheriff individually, and
4 he asserts his right to qualified immunity, and she has not
5 overcome it.

6 THE COURT: All right. As to Sheriff Gonzalez, the -
7 - and again, to be clear, we're talk -- Mr. Butt was talking
8 about -- I'm going to -- there's going to be a dismissal as to
9 Sheriff Gonzalez, but just as to the individual capacity
10 claims, but he stays as a -- an official in his official
11 capacity.

12 MR. BUTT: Yes, Your Honor.

13 THE COURT: All right, so.

14 MS. LEWIS: And is -- so, the -- I'm sorry, I -- you
15 mean dismissal -- a voluntary dismissal by the plaintiff or --

16 THE COURT: No, no, no, I'm --

17 MS. LEWIS: -- the Court?

18 THE COURT: -- I'm doing -- I'm taking kind of --
19 you'll have it for appeal. That's what I'm trying to
20 articulate now.

21 MS. LEWIS: I see. Okay.

22 THE COURT: If you want to -- Sheriff Gonzalez,
23 you've pleaded him in his official capacity and his individual
24 capacity, correct?

25 MS. LEWIS: Correct.

1 THE COURT: Okay. He stays in. He's a defendant, he
2 stays in, in his official capacity. To the extent that you've
3 attempted to plead him in his individual capacity, I'm
4 dismissing that. I don't see any allegations of his personal
5 participation in any of the underlying events, and I don't see
6 any particular policy pleaded that he implemented or that is
7 the moving force for the claims that you're bringing. There's
8 some things that are alleged as to after the fact for failure
9 to discipline, et cetera, but that's not anything that could
10 have caused the conduct. That's just limited to what happened
11 to Deputy Cannon after the fact in this incident.

12 So, those are dismissed. If there's -- it'll be
13 without prejudice, but you would need to seek leave to re-plead
14 -- to assert something in his individual capacity within 30
15 days or the dismissal will be with prejudice.

16 MS. LEWIS: Yes, Your Honor.

17 THE COURT: Okay?

18 MS. LEWIS: Should I supplement with that so there's
19 not -- it doesn't get as sticky as before and -- and everybody
20 -- and all the other defendants would have to respond to an
21 amended complaint?

22 THE COURT: Yes. I guess any further allegations
23 that you want to make, if you wanted to plead something as to
24 Sheriff Gonzalez, do it in the appropriate spot in your current
25 complaint, and if it, for instance, would follow Paragraph 32,

1 do it is 32-A. Whatever you need, do it as identified other
2 paragraphs.

3 MS. LEWIS: Yes.

4 THE COURT: So that you're not -- not needing to
5 change everything else. I don't want motions again on
6 everything else. If you -- and again, if you want to try to
7 replead him in his individual capacity, which --

8 MS. LEWIS: I may not. I believe that I have pleaded
9 him to -- you know, to a pretty good extent, but I may -- it's
10 fine I think.

11 THE COURT: And that's the thing. If you want to try
12 to replead that in his individual capacity, do it so that
13 you're just supplementing allegations as to him. If not, my
14 dismissal without prejudice will be one with prejudice, and
15 then you'll have that issue on appeal for whenever you might --

16 MS. LEWIS: That sounds --

17 THE COURT: -- have an appeal. It wouldn't be
18 immediately, though.

19 MS. LEWIS: I understand. Yes, I understand. Thank
20 you.

21 THE COURT: Okay. All right. All right. As to
22 Deputy Cannon, Mr. Butt, I'm more inclined on these -- as
23 pleaded right now, I'm more inclined to say that
24 (indiscernible) there's enough to get by qualified immunity,
25 but given what you articulated and so it would be more for

1 questions on your side of the bench or side of the bar, and
2 given what you said about representations, do I need to have
3 your co-counsel here to address that?

4 MR. BUTT: I don't think so, Your Honor. I agree
5 that on the issue of force, it typically is a question of fact,
6 and without looking at any of the visual evidence, it's
7 difficult to rule on qualified immunity from just the pleading.

8 THE COURT: Well, so then as to all of this -- well,
9 okay, so let me articulate it like this. Based on the
10 conversations we've been having, and I do want to see the
11 footage and I want to see the body cam footage and I want to
12 have other thoughts about that, I've articulated that we'll be
13 going forward. There will be discovery on those aspects, and
14 I'll be revisiting a lot of this on summary judgment.

15 But on qualified immunity, Deputy Cannon, my
16 understanding is he'd have the ability to appeal immediately if
17 he wanted to. And so, if that's the inclination, I need to get
18 to a ruling that would deny qualified immunity at this instance
19 that could be appealable if that was the inclination.

20 Otherwise, what I'm saying is we're not really -- and
21 I could do that. But if your -- your client has a right to
22 appeal qualified immunity, right, if I -- if I say no, we're
23 going forward. If you're saying (indiscernible) to allow it to
24 proceed so that I address this on summary judgment, that makes
25 it easy for me, but I'm not saying that you have to do that.

1 Do you see what I'm saying?

2 MR. BUTT: Your Honor, I would defer --

3 THE COURT: I want to know what ruling we need to so
4 that appeal rights, if necessary, are properly preserved.

5 MR. BUTT: I would certainly want to confer with Ms.
6 Bradley on her plans for Deputy Cannon and not address the
7 issue of his future and so far on qualified immunity.

8 THE COURT: Exactly. Exactly. So, all right, let me
9 hold on argument as to that then. You will -- Mr. Butt, you'll
10 confer -- is it Ms. -- who represents --

11 MR. BUTT: Suzanne Bradley.

12 THE COURT: You will confer with Ms. Bradley about
13 where we are on status and that. I'm going to have ultimately
14 the body cam footage in front of me. I'm going to be
15 addressing a lot of this on summary judgment, et cetera, that I
16 was inclined at this point -- if I went through to ruling based
17 on what I've read to this point, I was inclined to deny
18 qualified immunity.

19 If Ms. Bradley, on behalf of her client, would
20 otherwise want to appeal that, I'm happy to have further
21 argument and reduce that into an order that's more appropriate
22 for appeal. I don't want to be taking action here that's like
23 we're going to go forward under this understanding and then I
24 get appealed. I -- I want to have further argument and make a
25 different -- probably reach the same decision but a more

1 articulated decision.

2 MR. BUTT: Certainly.

3 THE COURT: But if everybody's fine for me to look at
4 it on summary judgment, we'll -- we'll proceed that way. Okay?

5 MR. BUTT: Yes, Your Honor.

6 THE COURT: So, within a week you can let us know?

7 MR. BUTT: Yes.

8 THE COURT: And I'll get you all back in front of me
9 very quickly if you want to have further argument or if she
10 wants to have argument.

11 MR. BUTT: In terms of advising the Court, then would
12 it be a pleading that we submit that --

13 THE COURT: It could just be a status report.

14 MR. BUTT: Status report.

15 THE COURT: Status report. You'll have my minute
16 entry.

17 (Hearing adjourned at 11:36 p.m.)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

A handwritten signature in dark ink, reading "Sonya M. Ledanski Hyde". The signature is written in a cursive, flowing style.

Sonya Ledanski Hyde

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Date: May 24, 2023